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IN THE  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

AMERICAN MINERAL PRO-  
DUCTION COMPANY, a cor-  
poration,

*Plaintiff in Error,*

*vs.*

F. M. HELSLEY,

*Defendant in Error.*

No. \_\_\_\_\_

3184

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*Upon Writ of Error from United States District Court  
in and for the Eastern District of  
Washington, Northern Division.*

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**Brief of Plaintiff in Error**

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POST, RUSSELL, CAREY & HIGGINS,  
*Attorneys for Plaintiff in Error,*  
Spokane, Washington.



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STATEMENT OF CASE.

This is an action brought by F. M. Helsley as plaintiff against C. R. Cole and American Mineral Production Company, defendants, and, according to the amended complaint, Mr. Helsley contended that

C. R. Cole was a resident of Chicago, Illinois, and that the American Mineral Production Company was a corporation organized under the laws of the State of South Dakota, and that on about the 14th day of July, 1917, the defendants, in consideration of the sum of \$5500.00, orally purchased from the plaintiff, and the plaintiff sold to the defendants, all his right, title and interest in and to six motor trucks described in detail in said amended complaint, and further alleged in the complaint that immediately after the sale the defendants took possession of said trucks, and commenced to operate same, hauling magnesite from the quarries of the defendant corporation; that demand for the payment had been made and refused, and plaintiff prayed judgment in the sum of \$5500.00 with interest from the 15th day of July, 1917. (Transcript, pp. 1-3.)

The answer to the amended complaint admitted that Mr. Cole was a resident of the City of Chicago, and that the defendant corporation was a South Dakota corporation, and denied the purchase of the personal property mentioned in the amended complaint, and taking possession, and placed in issue all of the material facts alleged in the amended complaint, and for further answer and affirmative defense it was alleged that any negotiations that were had between the plaintiff and defendants, or either of them, for the sale of the trucks were entirely oral, and that the defendants did not accept or receive any part of the goods or give anything in earnest of the said

bargain, or sign any note or memorandum in writing, and that the alleged contract of sale mentioned was void under Sec. 5290, Remington & Ballinger's Annotated Codes and Statutes of the State of Washington. (Trans., 4.)

The reply of Mr. Helsley denied the allegations contained in the affirmative defense.

The case came on for trial on the 23rd day of April, 1918, at which time testimony was taken before the court and a jury.

The evidence of plaintiff shows that in the early part of the year 1917, Mr. Helsley and one John Wilson were co-partners in what is known as the Cashmere Truck Line, and on or about the 1st of June, 1917, Mr. Wilson sold his interest in the Cashmere Truck Line to Mr. C. R. Cole. At the time of the sale of the interest of John Wilson to C. R. Cole in and to this Cashmere Truck Line, a representative of Waterhouse-Sands Company, the concern that sold the motor trucks to Wilson and Helsley, was present and consented to the transaction, it being a provision in the contract of sale of the motor trucks by Waterhouse-Sands Company to Helsley and Wilson that no sale could be made by them unless consented to and approved by Waterhouse-Sands Company, or their representative. (Trans., 26.)

The firm of Cashmere Truck Line, when composed of Wilson and Helsley, made a contract with the

American Mineral Production Company to haul ore from its quarries near Valley, Washington, to Valley, Washington, and this continued until the sale of Wilson's interest to Mr. Cole on or about June 1st, 1917. After the sale of Mr. Wilson's interest to Mr. Cole, these same trucks were used to perform the contract with the American Mineral Production Company under the supervision and charge of Mr. Helsley.

In the latter part of June, 1917, Mr. Cole went to Valley, Washington, where he met Mr. Helsley and negotiations were commenced between Mr. Cole and Mr. Helsley for the sale and purchase of the interest of one or the other to the other. The negotiations continued in Spokane, Washington, on or about the 14th day of July, 1917. Mr. Helsley states that on that date a deal was closed at a meeting where Mr. Cole, Mr. Smith, Mr. Helsley and Mr. Cowan were present. Mr. Helsley testified that so far as he knew Mr. Cole was president of the American Mineral Production Company, and that Mr. T. P. Smith was an accountant for the American Mineral Production Company. No showing was made by Mr. Helsley, either in his own testimony or in the testimony of any other witness, that he was dealing with Mr. Cole as president of the American Mineral Production Company in this transaction.

After the meeting in Spokane, Washington, on the afternoon of the 14th of July, 1917, Helsley went back to Valley, Washington, and left the trucks with

the American Mineral Production Company and went fishing until the 17th or 18th of July, when he again came to Spokane for the purpose, as he says, of getting payment on these trucks. He stated that the deal made with Mr. Cole on the 14th day of July was that Mr. Cole was to pay him \$5500.00 for his interest in the trucks, and assume all obligations incurred by reason of the purchase price or the operation of these trucks. When he went to Valley on or about the 14th day of July, 1917, he not only left the trucks with the American Mineral Production Company, but also turned over to them all oil and gasoline which he had on hand for the purpose of operating these trucks.

No representative of Waterhouse-Sands Company was present at the meeting in Spokane on July 14th, 1917. On the 18th of July, 1917, when Mr. Helsley went to Spokane and to the office of Mr. Carey, attorney for Mr. Cole, for the purpose, as he says, of getting the payment for the trucks, there was present a Mr. Kover, who was there representing the Waterhouse-Sands Company, and at this time at a meeting between Mr. Helsley, Mr. Smith and Mr. Carey, attorney for Mr. Cole, much conversation was had relative to the amount of the bills outstanding against the truck company. The amount of these was not known by any parties to this transaction. At this time some of these were obtained by Mr. Hilsley, and a form of written contract was prepared for signature, which contract was never signed. This

form of written contract is introduced in evidence as defendants' exhibit 3. This exhibit was offered to Mr. Helsley on the witness stand, and he stated he knew nothing of it except that he knew one was being made up for the transaction, and that he knew when he was in Mr. Carey's office with Mr. Kover and Mr. Smith, that Mr. Carey was getting information to prepare a written contract. He thought the written contract would be signed, and he expected to sign it. (Trans., 39.)

It further appeared from plaintiff's testimony that when Helsley went to Valley on the 14th of July, a man by the name of Bunyard took charge of the trucks for the American Mineral Production Company and proceeded to operate them with the same crew Helsley had had prior to that time. These men were all paid by the American Mineral Production Company from and after July 15, 1917.

At the close of the plaintiff's case a challenge was made to the sufficiency of the evidence as to C. R. Cole, and a motion was made for a judgment in his behalf, and also a like challenge and motion were made on behalf of the American Mineral Production Company. The court sustained the motion as to C. R. Cole, and denied the challenge and motion as to the American Mineral Production Company. Exception was taken to the ruling of the court on the motion in behalf of the American Mineral Pro-

duction Company, and the case proceeded with the defense.

At the conclusion of the defendants' case, the challenge to the sufficiency of the evidence in behalf of the American Mineral Production Company was renewed and denied by the court, and exception was taken. On motion of plaintiff the amended complaint was amended eliminating Cole from the case. (Trans., 104.)

The case was submitted to the jury on instructions and they returned a verdict in favor of the plaintiff and against the American Mineral Production Company in the sum of \$5753.00, together with costs and disbursements.

A motion for new trial was made and denied.

The court fixed the bond on the writ of error in the sum of \$7500.00. Said bond was furnished and filed and approved on the 28th day of June, 1918. The writ of error was granted on petition of the American Mineral Production Company and the record was filed. Assignments of error were also served and filed and are as follows:

#### ASSIGNMENTS OF ERROR.

"I.

That the United States District Court, in and for the Eastern District of Washington, Northern Division, erred in denying the challenge to the

sufficiency of the evidence, and motion for a judgment in favor of the American Mineral Production Company was made at the close of the plaintiff's case, for the following reasons:

1. That the evidence did not show any contract between the plaintiff and the defendant American Mineral Production Company.

2. That the evidence did not show any cause of action in favor of the plaintiff and against the defendant, as alleged in the amended complaint in said cause, or at all.

3. That the contract alleged in the amended complaint and as alleged at the trial was not proven by the evidence produced at the trial.

## II.

That the court erred in denying defendant's challenge to the sufficiency of the evidence and motion for a judgment in favor of the American Mineral Production Company at the close of all the evidence in the case for the following reasons:

1. That the evidence did not show any contract between the plaintiff and the defendant American Mineral Production Company.

2. That the evidence did not show any cause of action in favor of the plaintiff and against the said defendant, as alleged in the amended complaint in said cause, or at all.

3. That the contract alleged in the amended complaint and as alleged at the trial was not proven by the evidence produced at the trial.

## III.

That the court erred in ordering judgment to be entered in said action in favor of the plaintiff and against the defendant American Mineral Production Company.

## IV.

That the court erred in rendering and entering judgment in favor of the plaintiff and against the defendant, American Mineral Production Company."

## ARGUMENT.

We beg to call to the attention of the court at this time, that in paragraph three of the assignments of error are the words "as alleged at the trial." These words should read "as amended at the trial."

The assignments of error in this case are based upon the contention that no contract with the American Mineral Production Company was shown by the evidence in this case.

The evidence is undisputed that prior to June 1st, 1917, F. M. Helsley and one John Wilson were co-partners operating a truck line under the name of Cashmere Truck Line. They had a contract with the American Mineral Production Company for hauling magnesite from the quarries of that company to the railroad at Valley, Washington. They continued to act under this contract until June 1st, 1917, when John Wilson sold his interest in and to the Cashmere Truck Line to one C. R. Cole.

When Wilson and Helsley were running the Cashmere Truck Line they purchased some motor trucks from Waterhouse-Sands Company on a conditional sales contract. This contract provided that no sale

of any interest in the trucks could be made by the vendee unless there be consent thereto by the vendor or its representatives. When Mr. Cole purchased Mr. Wilson's partnership interest in and to this truck line Mr. Mandell, the representative of Waterhouse-Sands Company, was present and consented to the transfer of Mr. Wilson's interests to C. R. Cole.

After the date of this transfer of Wilson's interests to Cole, the truck line continued to operate under the contract with the American Mineral Production Company for hauling magnesite. This contract appears to be the only one that the truck line had, and that is the only work the truck line was doing.

This condition continued until Mr. Cole went to Valley about June 25, 1917, where he took up the matter of selling Mr. Cole's interests to Helsley or of Mr. Cole buying Helsley's interest in the truck line, which Helsley could not do. These negotiations continued for some time, both at Valley, Washington, and at Spokane, Washington, and on Saturday, July 14th, 1917, Helsley and Cole met in Spokane, at which time Helsley says the deal was completed. He says he was to turn over everything for \$5500.00 and be released from all obligations on the purchase price of the trucks and those incurred in operating the trucks. This is denied by Cole. On July 14th, 1917, the total amount of the accounts outstanding against the truck line was unknown both to Helsley and to Cole. No money was

put in the deal at that time; no delivery of trucks was made at that time, no representative of Waterhouse-Sands Company was present; and no consent of Waterhouse-Sands Company was given to the transfer of Helsley's interest in the trucks, as provided by the conditional sale contract. Nothing was said in any of these negotiations about the American Mineral Production Company. It is true that Helsley testified while on the witness stand that so far as he could find Mr. Cole was president and manager or whatever you might call it of American Mineral Production Company, but nowhere does he state, nor does his evidence show at any place that Mr. Cole was acting in the capacity of president, or that of any other officer of the American Mineral Production Company in these negotiations. Helsley's testimony as shown on page 16 of the transcript was to the effect that he had negotiations with the *defendants*. Both Cole and American Mineral Production Company were defendants in this case. His complaint was drawn on the theory that there was a sale to both defendants, not that he sold to the American Mineral Production Company or to C. R. Cole. He expected the money for the transaction to be paid by C. R. Cole, not by C. R. Cole as president or manager of the American Mineral Production Company, nor by the American Mineral Production Company.

At the close of the entire evidence in this case counsel for Mr. Helsley made a motion to dismiss

this case as to Mr. Cole and to stand on the evidence in a claim against the American Mineral Production Company.

Events subsequent to July 14th, 1917, show conclusively, we contend, that Mr. Helsley did not think that the transaction was completed on July 14th, 1917. He came to Spokane, Washington, on the 18th of July, 1917, and went to the office of Mr. Carey, who was attorney for Mr. Cole. At that time there was present a Mr. Kover, who was a representative of the Waterhouse-Sands Company. When Mr. Helsley went to Mr. Carey's office, steps were taken by both Mr. Carey and Mr. Helsley to ascertain the amounts of the various accounts against the Cashmere Truck Line. This was done for the purpose of putting the same in a contract to be signed by Mr. Helsley and Mr. Cole. This contract was reduced to writing and the various amounts which were obtained after much effort on the part of both Helsley and Mr. Carey were inserted in said contract. Mr. Helsley testified, as shown on page 39 of the transcript, that he understood that they were drawing up a written contract and that he expected to sign it; that this was July 18th, 1917, four days after the conversation he had with Mr. Cole in the Spokane & Eastern Trust Company. He further testifies that he did not sign such contract, but that the defendants' Exhibit No. 3, which was shown Mr. Helsley when he was on the witness stand (Trans., 36), contained the terms of the agreement as he

understood them. On page 52 of the transcript Mr. Helsley testified that he went to Spokane on the 18th day of July, 1917, and that he expected that this contract would be reduced to writing, and he went to Mr. Carey's office for that purpose.

Assuming, for the purpose of this point, that Mr. Cole was acting in his capacity of president or manager of the American Mineral Production Company in this transaction, and that the negotiations were had between the American Mineral Production Company looking forward to the sale of Helsley's interest in the truck line to the American Mineral Production Company, under the testimony referred to immediately heretofore, undoubtedly it was contemplated by the parties to the transaction that the terms of the contract were to be reduced to writing after all the facts could be collected for the purpose of inserting the same therein. These facts were not in the hands of either party until the 18th day of July, 1917, after the amounts of the accounts had been ascertained. Under these circumstances, the contract would not be complete until it had been reduced to writing and signed by the parties thereto.

*McDonnell v. Coeur d'Alene Lumber Company*, 56 Wash., 495; 26 L. R. A. (N. S.) 222;

9 Cyc. 280

*McCormick v. Oklahoma City*, 203 Fed. 921.

As pointed out above, the trucks involved in this transaction had been purchased from Waterhouse-

Sands Company on a conditional sale contract, which provided, among other things, that the vendees could not sell or transfer their right without the written consent or approval of the Waterhouse-Sands Company, or their representative. The obtaining of this approval or consent was a necessary condition precedent before Mr. Helsley had any right or authority to transfer any interest that he might have in the trucks. This procedure was followed in the case of the sale of any interest Wilson had to Mr. Cole, and the written approval of that transaction was given by the representative of the Waterhouse-Sands Company. As pointed out above, no representative of the Waterhouse-Sands Company appeared in the transaction between Mr. Helsley and Mr. Cole until the 18th of July, when the written contract was being prepared for signature, and Mr. Helsley was in no position to complete the transaction between him and Mr. Cole until this approval had been obtained. Conditions of this kind have been upheld, and the vendee of personal property under a contract of conditional sale cannot pass title without the consent of the vendor.

*National Cash Register Co. v. Ferguson*, 55  
N. Y. Supp. 592.

The fact that Mr. Cole was president of the corporation does not establish that he was acting in that capacity in these negotiations. It is true that Mr. Helsley says so far as he could find Mr. Cole was the president and manager of the American Mineral

Production Company. Mr. Cole testifies positively and emphatically on the stand that he was president of that company. But this fact alone does not make the transaction one of the company. It may be that the contract was beyond the scope of authority of Mr. Cole as president of the corporation; it may be that the contract was one that the corporation did not desire to make; it may be that it was a contract that the corporation as such could not make. There must be some showing of authority of Mr. Cole to represent the corporation in this transaction, and that he did actually act for said corporation. Unless this be shown, the corporation cannot be held on this claim.

*Cook on Corporations*, §716 (7th Ed.);  
*Woodruff v. Shimer*, 174 Fed 584.

There is another reason why the evidence in this case does not establish an enforceable contract between Helsley and the American Mineral Production Company. As pointed out above, Mr. Helsley and Mr. Wilson were co-partners in the truck line; that Mr. Wilson sold his interests in the truck line to Mr. Cole on or about June 1st, 1917. When Mr. Cole tried to negotiate with Mr. Helsley for his interest in the trucks, he could not have negotiated with Mr. Helsley for the American Mineral Production Company, a corporation, to purchase the interest of Mr. Helsley in this partnership. The law is that a corporation has no power to enter into a partnership in the absence of statutory authority.

*Fechteler v. Palm Bros. & Co.*, 133 Fed. Rep. 462-465, and cases there cited.

No Washington statute giving authority to a corporation to enter into a co-partnership is shown in this case, and there is no such Washington statute. It is true that the American Mineral Production Company is a corporation organized under the laws of South Dakota, but in the absence of showing to the contrary, the presumption is that the laws of the State of South Dakota are identical with the laws of the State of Washington on this subject.

*Gunderson v. Gunderson*, 24 Wash. 459;

*Hickman v. Alpaugh*, 21 Cal. 226;

*Sheppard v. Coeur d'Alene Lumber Co.*,  
62 Wash. 12.

Moreover, reference to the statutes of South Dakota does not disclose a statute granting such power to a corporation.

It is true that Mr. Helsley testified in this case that when he went to Valley, on the night of the 14th of July, 1917, he turned everything over to the American Mineral Production Company; that they took possession of and continued to operate the trucks until they were taken from the American Mineral Production Company on the 21st day of July, 1917, by the sheriff under a foreclosure sale. But we contend that the mere fact that Helsley walked out and left these trucks in possession of the American Mineral Production Company does not strengthen his

contention that the contract was completed. His subsequent conduct in getting the information to put in the proposed written contract, which he expected to sign, information which was not at hand on July 14th, 1917, and information that was necessary to incorporate in the contract in order to make it complete, and the necessity of getting the approval of Waterhouse-Sands Company, are sufficient to show that the contract was not completed on July 14th, 1917.

We submit that the court erred in not sustaining the challenge to the sufficiency of the evidence and in granting the motion for the judgment in behalf of the American Mineral Production Company, both at the close of plaintiff's case and at the close of the entire case; that the judgment is erroneous and should be reversed, and the case remanded for a new trial.

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